Supreme Court U.S.
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No. 02-852

IN THE

SUPREME COURT OF THE UNITED STATES

FRANCES CLAY,
Petitioner,

v.

PROCTER & GAMBLE PAPER PRODUCTS COMPANY, PROCTER & GAMBLE, and Certain Subsidiaries, PROCTER & GAMBLE DISABILITY BENEFIT PLAN, and PROCTER & GAMBLE BENEFIT PLAN TRUST,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PARTIES

The caption of the case shown on the Petition contains all parties, though the correct name for each of the parties is as follows: The Procter & Gamble Paper Products Company, The Procter & Gamble Company, The Procter & Gamble Disability Benefit Plan, and The Procter & Gamble Benefit Plan Trust. The Procter & Gamble Company is the parent company. No publicly held company owns 10 percent or more of The Procter & Gamble Company's stock.

TABLE OF CONTENTS

PAGE

PARTIES i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATUTES AND REGULATIONS INVOLVED vii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 13

I. THE ELEVENTH CIRCUIT'S DECISION THAT THE TRUSTEES' PLAN INTER-PRETATION IS NOT ARBITRARY AND CAPRICIOUS IS CONSISTENT WITH OTHER CIRCUIT COURT PRECEDENT AND CORRECT ON THE MERITS 16

A. CLAY FAILS TO IDENTIFY ANY CONFLICT AMONG THE CIRCUITS WITH RESPECT TO THE STANDARD OF REVIEW OF THE TRUSTEES' PLAN INTER-PRETATION AND NONE EXISTS 16

B. THE TRUSTEES' INTER-PRETATION OF THE PLAN, WHICH RESULTS IN THE

DENIAL OF TOTAL DISABILITY BENEFITS TO ONE WHO IS CAPABLE OF WORKING FULL-TIME AND WHICH REQUIRES MORE THAN A DOCTOR'S SUBJECTIVE CONCLUSORY OPINION TO SUPPORT A TOTAL DISABILITY FINDING, IS REASONABLE. 18

II. THE ELEVENTH CIRCUIT'S DECISION THAT THE PLAN'S DETAILED DETERMINATION LETTERS SUBSTANTIALLY COMPLIED WITH THE ERISA NOTICE REQUIREMENTS IS CONSISTENT WITH OTHER CIRCUIT COURT PRECEDENT AND CORRECT ON THE MERITS. 22

A. THERE IS NO CONFLICT AMONG THE CIRCUITS WITH RESPECT TO THE ERISA NOTICE REQUIREMENTS. 23

B. THE TRUSTEES' DECISIONS SUBSTANTIALLY COMPLY WITH THE ERISA NOTICE REQUIREMENTS. 25

CONCLUSION 30

TABLE OF AUTHORITIES

PAGE

Cases

Bayles v. Central States, Southeast & Southwest Areas Pension Fund,
602 F.2d 97 (5th Cir. 1979) 17

Bendixen v. Standard Ins. Co.,
185 F.3d 939 (9th Cir. 1999) 25

Brehmer v. Inland Steel Indus. Pension Plan,
114 F.3d 656 (7th Cir. 1997) 17

Brown v. Blue Cross & Blue Shield, Inc.,
898 F.2d 1556 (11th Cir. 1990). 16

Brown v. Retirement Comm. of Briggs & Stratton Ret. Plan,
797 F.2d 521 (7th Cir. 1986) 23

Brumm v. Bert Bell NFL Ret. Plan,
995 F.2d 1433 (8th Cir. 1993) 17

Buckley v. Metropolitan Life,
115 F.3d 936 (11th Cir. 1997) 18

Counts v. American Gen. Life & Accident Ins. Co.,
111 F.3d 105 (11th Cir. 1997) 23

Dade v. Sherwin-Williams Co.,
128 F.3d 1135 (7th Cir. 1997) 25

De Nobel v. Vitro Corp.,
885 F.2d 1180 (4th Cir. 1989) 17

Donato v. Metropolitan Life Ins. Co.,
19 F.3d 375 (7th Cir. 1994) 15, 24, 29

Ellenburg v. Brockway, Inc.,
763 F.2d 1091 (9th Cir. 1985) 24

Firestone Tire & Rubber Co. v. Bruch,
489 U.S. 101 (1989) 16

Fuller v. CBT Corp.,
905 F.2d 1055 (7th Cir. 1990) 17

Gallo v. Amoco Corp.,
102 F.3d 918 (7th Cir. 1996) 24

General Talking Pictures Corp.
v. Western Elec. Co.,
304 U.S. 175 (1938) 14

Halpin v. W.W. Grainger, Inc.,
962 F.2d 685 (7th Cir. 1992) 24

Hancock v. Montgomery Ward
Long Term Disability Trust,
787 F.2d 1302 (9th Cir. 1986) 17, 23

Jett v. Blue Cross & Blue Shield, Inc.,
890 F.2d 1137 (11th Cir. 1989) 17

Kent v. United of Omaha Life Ins. Co.,
96 F.3d 803 (6th Cir. 1996) 24

Paramore v. Delta Air Lines,
129 F.3d 1446 (11th Cir. 1997) 29

Perrino v. Southern Bell Tel. & Tel. Co.,
209 F.3d 1309 (11th Cir. 2000) 23

Ponce v. Construction Laborers Pension Trust,
628 F.2d 537 (9th Cir. 1980) 17

Recupero v. New Eng. Tel. & Tel. Co.,
118 F.3d 820 (1st Cir. 1997) 18

Skretvedt v. E.I. DuPont De Nemours & Co.,
268 F.3d 167 (3rd Cir. 2001) 17, 25

Terry v. Bayer Corp.,
145 F.3d 28 (1st Cir. 1998) 23, 28

University Hosps. v. Emerson Elec. Co.,
202 F.3d 839 (6th Cir. 2000) 17, 25

Van Boxel v. Journal Co. Employees' Pension Trust,
836 F.2d 1048 (7th Cir. 1987) 17

Wolfe v. J.C. Penney Co.,
710 F.2d 388 (7th Cir. 1983) 23

Young v. Secretary of Health & Human Servs.,
957 F.2d 386 (7th Cir. 1992) 25

STATUTES AND REGULATIONS INVOLVED

PAGE

29 C.F.R. § 2560.503-1(f) 23

29 U.S.C. § 1133 23

STATEMENT OF THE CASE

Petitioner Frances Clay (hereinafter "Clay") was employed by The Procter & Gamble Paper Products Company's (hereinafter "P&G") Albany, Georgia plant, beginning in September 1978. (R38 - Pl.'s Stmt. of Mat. Facts at ¶ 1) As a result of an automobile accident in 1986, Clay was placed on medical restrictions by her physician. Because of these restrictions, P&G assigned Clay to a "storeroom window" position in 1987, which involved less physical and mental strain than Clay's previous assignment. (R35 - Ex. 24; R 38 - ¶ 8) Clay performed all aspects of this job in a satisfactory manner until the latter part of 1993, when P&G reorganized the storeroom and eliminated the "storeroom window" position. (R35 - Ex. 6; R36 – pp. 20-33, 36, 41-43, 53-58) At that time, P&G asked Clay to provide updated medical information which might permit management to reassign her to a position consistent with her capabilities and medical restrictions. (R35 - Exs. 6-9; R36 – pp. 43-46)

Since Clay failed to provide the requested updated medical information and Clay could not, based on available medical information, perform the reorganized positions in the storeroom, she was placed on "plant disability" status effective December 14, 1993.[1] Plant disability is a leave of absence with pay while an employee proceeds with an application for disability benefits under The Procter & Gamble Disability Benefit Plan (hereinafter the "Plan"). Plant disability is only a temporary designation until the Plan Board of Trustees (hereinafter the "Trustees") make a formal designation, *i.e.*, partially disabled, totally disabled, or not

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[1] In her Petition, Clay asserts that she was classified as totally disabled at this time. (Petition of Clay, pages 2 and 5, hereinafter "Clay Pet. at ___",) This is not accurate.

disabled. (R35 - Exs. 10-11, Moran Affidavit ¶¶ 4,7; R36 – pp. 27-28, 33-34) Since Clay was a participant in the Plan, she was informed that, if she needed to miss work beyond December 21, 1993, she should apply for benefits under the Plan. (R35 - Exs. 10-11)

On December 21, 1993, Clay visited her treating physician, Dr. John Baker, and received updated medical restrictions, which provided that she could return to work full-time, effective December 14, 1993, so long as she did not lift over thirty pounds, lift twenty pounds over her head, carry over twenty pounds, climb ladders, or engage in a full range of reaching, including overhead. (R35 - Ex. 13) Since P&G determined that there was no work available at the Albany Plant, which Clay could perform within those restrictions, she visited Dr. Baker a second time on December 22, 1993. At that time, Dr. Baker again concluded which Clay could return to work full-time, effective December 14, 1993, and he modified her restrictions making them less demanding. (R35 – Ex. 13) After receiving Dr. Baker's December 22 opinion, P&G determined that Clay still was not capable of performing available jobs at the Albany Plant and, therefore, Clay applied for benefits under the Plan. (R35 - Exs. 10-11, Ex. 13, Moran Aff. ¶ 5; R36 - pp. 70, 79)

The Plan provides disability benefits to employees who have a "total disability" and to those who have a "partial disability." The Plan defines a "total disability" as

> [A] mental or physical condition resulting from an illness or injury which is generally considered totally disabling by the medical profession. Usually, Total Disability involves a condition of such severity as to require care

> in a hospital or restriction to the immediate confines of the home.

(R35 – Ex. 1 – p. 5, Ex. 2 – p. 4, Ex. 3 – p. 4)

A "partial disability," on the other hand, is defined by the Plan as

> [A] mental or physical condition resulting from an illness or injury because of which the Participant cannot perform regular duties but can perform other useful duties. Thus, a condition of Partial Disability does not necessarily prevent the Participant from performing useful tasks, utilizing public or private transportation, or taking part in social or business activities outside the home.

(R35 – Ex. 1 – p. 3, Ex. 2 – p. 2, Ex. 3 – p. 2)

In regard to total disability, the Summary Plan Description[2] (hereinafter "SPD") explains as follows:

> **Total disability** means a physical or mental illness or injury which is generally considered totally disabling by the medical profession. Usually, a total disability requires care in a hospital or confinement at home.

(R35 – Ex. 4 – p. 12) (Emphasis in original)

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[2] The SPD are comprehensive booklets which explain in plain language, including numerous easily understood examples, how the Plan works, the coverage of the Plan, how to apply for benefits, and the rights and obligations of all participants. (R35 – Exs. 4, 5)

The SPD also explains in detail the entitlement to partial disability benefits. The SPD provides:

> You'll qualify as **partially disabled** if an off-the-job physical or mental illness or injury keeps you from performing your regular duties—but doesn't keep you from performing other useful duties either for the Company or another employer.
>
> If you're partially disabled, you may apply for less physically demanding work than you were performing before the disability. You will need a statement from your doctor that specifies which activities you can and can't perform.
>
> If practical, the Company will give you work that you can perform while partially disabled. However, if there is no work you can perform, you may find work through another employer and still be eligible to receive partial disability benefits from this Plan.
>
> You may also receive partial disability benefits if you cannot find work either in the Company or outside the Company.

(R35 – Ex. 4 – p. 16)(Emphasis in original)

The Plan limits partial disability benefits to a lifetime maximum of fifty-two weeks, while total disability benefits last for the duration of the disability. (R35 - Ex. 1 – pp. 3, 5; Ex. 2 – pp. 4, 6; Ex. 3 – pp. 4, 6)

The Plan is administered by Trustees who:

> [H]ave the discretionary authority to interpret the terms of this Plan and to determine eligibility for and entitlement to Plan benefits in accordance with the terms of this Plan. Determination by the Trustees as to the interpretation and application of this Plan in any particular case shall be conclusive on all interested parties and their action shall not be subject to any review.

(R35 - Ex. 1 – p. 18; Ex. 2 – p. 14; Ex. 3 – p. 14) The Plan further provides that, in their discretion, the Trustees may require a participant to submit to a physical examination by a physician designated by the Trustees and paid for by the Plan. (R35 - Ex. 1 – p. 12; Ex. 2 – pp. 11-12; Ex. 3 – p. 12) A participant may appeal the denial or termination of benefits within sixty days of receiving the notice. (R35 - Ex. 5 – p. 7)

In 1996, an administrative guideline for the Plan was issued. This guideline stated:

> **II. Social Security Awarded after Partial Disability benefits have been terminated.** If the Social Security Award is received after the participant's Partial Disability benefits have terminated (expiration of 52 weeks) and the appeal period has lapsed the closed disability case will not be reopened unless fraud is indicated.

* * * *

> If the Plan is notified of a Social Security Award after termination of [partial disability] benefits at 52 weeks and after the 60 day appeal period, the Plan will generally not be required to reinstate Total Disability benefits.

(R35 - Ex. 37 – p. 3)(Emphasis in original)

By letter dated January 25, 1994, and provided to Clay, the Trustees decided she was partially disabled, effective December 14, 1993, with benefits to begin effective December 21, 1993. (R35 - Exs. 13, 17; R36 - pp. 69, 71-78) The Trustees explained the basis for their decision as follows:

> Ms. Clay has been absent from work due to post traumatic headaches and cervical spine strain. Her doctor, Dr. John B. Baker, has indicated that Ms. Clay may return to work with the restrictions of no full range of reaching (including overhead), no ladder climbing, no lifting over 30 lbs., no overhead lifting over 20 lbs. and no carrying over 20 lbs. As such, Ms. Clay is partially disabled as that term is defined in Article II, Section 11 of the Plan.

(R35 - Ex. 17; R36 - pp. 86-87) The Trustees further explained: "Once the lifetime total of 52 weeks of partial disability have been used, Ms. Clay, if she has not returned to work and continues to be disabled, may ask the Trustees to again review her status." (R35 - Ex. 17) Finally, the Trustees advised Clay of her right to appeal their decision, in

writing, within sixty days of her receipt of the determination. (R35 – Ex. 17)

On January 12, 1994, Clay was referred by P&G to Dr. Austin Colohan for an independent medical evaluation because of the conflict in her physician's evaluations of her capabilities on December 21, 1993, and then on December 22, 1993. (R35 - Ex. 12, Moran Aff. ¶ 5; R36 - pp. 61, 80) Dr. Colohan examined Clay on January 19, 1994, and concluded: "I doubt that surgical pathology exists in this case, but have recommended that she have a MRI. . . . At that point I believe return to work would be appropriate." (R35 - Exs. 14-15) MRIs were conducted on January 27, 1994, and revealed no evidence of disc herniation or other condition requiring surgical intervention, as confirmed by Dr. Colohan in a February 4, 1994, letter to P&G. (R35 - Exs. 16, 18; R36 - pp. 81, 84-85)

Subsequently, the Trustees determined that Clay should undergo a functional capacity assessment (hereinafter "FCA") to keep them "informed of [her] work restrictions." (R35 - Exs. 19, 21 – p. 2; R36 - pp. 28, 41) Contrary to Clay's assertion, her doctor did not state that she could not undertake the FCA; rather, he stated that Clay did not feel that she could take the FCA. (R35 - Ex. 24 - p. 11)

On March 9, 1994, Clay appealed the Trustees' partial disability determination, seeking total disability benefits and enclosing various medical records, most of which dated back to 1986-1988. She also enclosed the 1994 MRI reports and claimed she was unable to take the FCA. (R35 - Ex. 20; R36 - pp. 96, 108-09) By letter dated April 12, 1994, the Trustees denied Clay's appeal, relying upon Dr. Baker's December 22, 1993, certificate stating that she could

return to full-time work as of December 14, 1993. Specifically, the Trustees explained:

> The Trustees believe that this medical information [Dr. Baker's certificate] is still pertinent and supports their determination to change your status from totally to partially disabled. In a handwritten note of February 15, 1994, Dr. Baker states that you do not feel that you can do a functional capacity assessment. An assessment was requested by the Trustees to keep them informed of your work restrictions. Without a recent assessment the Trustees must rely on the information provided by Dr. Baker in December, 1993.

(R35 - Ex. 21 - p. 2; R36 - pp. 95-96)

On May 12, 1994, the Trustees suspended Clay's partial disability benefits as of March 10, 1994, based on her continued refusal to participate in the FCA. (R35 - Ex. 22; R36 - pp. 91-92, 94, 95) On May 25, 1994, Clay sent another letter to the Trustees, which they considered to be an appeal of the partial disability benefits suspension. Clay enclosed essentially the same medical records dating back to 1986. (R35 - Ex. 24; R36 - pp. 107, 109-10)

On May 31, 1994, Clay underwent an MRI of her brain. The MRI showed no problems with Clay's brain. (R35 – Ex. 42 at attachment 22; R36 - pp. 136-46)

On advice of her counsel, Clay attended an FCA on June 2 and June 7, 1994. Clay's results were "self-limited." (R35 - Ex. 27 – p. 7; R36 - p. 92) The examiner explained:

> She did not cooperate during testing. . . . Pain behaviors were seldom observed, although she reported pain frequently. . . . She did have normal coordination, range of motion, strength and endurance. . . . Her body mechanics, safety and efficiency were not a problem. . . . Lack of effort was consistent. . . . This is not a valid record of the patient's current physical capabilities because most tests were self-limited. . . .
>
> The patient can stand and sit 9-12 hours per day. She refused the walking test. Lifting and carrying, pushing, pulling and lifting overhead were self limited. Bending, stooping, climbing, balancing and reaching overhead were also self limited. She refused to stoop. She can frequently kneel. She did not demonstrate a willingness to operate foot pedals repetitively. She can use her hands for repetitive actions, but her speed was slow.

(R35 - Ex. 27 – p. 2)

On July 5, 1994, the Trustees reinstated Clay's partial disability benefits, based on information supplied in the FCA, and advised Clay as follows:

> Any change in your current condition or disability should be immediately reported to the Trustees. The Trustees will review supporting medical information forwarded for consideration in determining whether your condition has improved or deteriorated. An improvement in your condition could avail an

> opportunity for you to return to work without a disability or disability limitations. Alternatively, a worsening of your condition of disability could make you eligible for Total Disability Benefits. Article II of the Disability Benefit Plan defines "Total Disability" as a mental or physical condition resulting from an illness or injury that is generally considered totally disabling by the medical profession. Usually, Total Disability involves a condition of such severity as to require care in a hospital or restriction to the immediate confines of the home.
>
> Please forward additional supporting information (if applicable). . . .

(R35 - Ex. 27 – pp. 1–2; R36 - pp. 92, 115)

Clay's fifty-two weeks of partial disability benefits ended effective December 11, 1994. On December 15, 1994, Clay, through counsel, appealed the partial disability determination and in support offered only a December 2, 1994, physician's certificate from Dr. Baker which stated that she had been totally disabled since December 14, 1993, and that it was "indefinite when [Clay] will return to work, if ever." No supporting medical evaluation, objective evidence, or explanation was offered. (R35 - Ex. 34) Dr. Baker made no effort to explain what, if anything, had happened to Clay which changed her ability to work between December 22, 1993, when Dr. Baker stated that she could return to work full-time with certain restrictions, and December 2, 1994, when he concluded that she was totally disabled effective December 14, 1993.

The Trustees denied this appeal on January 10, 1995, explaining:

> The information provided in your appeal included an updated Physician's Certificate stating that as of December 2, 1994, it is "indefinite when will return to work, if ever." The newest submitted information does not provide any additional supporting medical information. . . . Although Ms. Clay cannot perform her regular duties, she elected to not complete the FCA, which would have established any limitations of her disability. The Trustees requested that Ms. Clay supply information from her Physician identifying any physical limitation supporting a finding of total disability. Ms. Clay has declined to provide any such information. On the basis of these facts, the Trustees have determined that Ms. Clay is partially disabled.

(R35 - Ex. 35 – p. 1)

By May 1994, Clay had applied for Social Security disability benefits. Her application was denied on October 31, 1994. Neither Clay nor her counsel advised the Trustees of this fact prior to or as part of her December 15, 1994, appeal to the Trustees. (R35 - Ex. 29; R36 - pp. 116-17, 119) Clay requested reconsideration of the Social Security Administration determination in December 1994 and it was denied on March 20, 1995. (R35 - Ex. 33, 36) On April 5, 1995, Clay again appealed the denial of Social Security benefits and, on or about November 14, 1996, after an administrative hearing, she was awarded those benefits. (R35 - Exs. 36, 38, 40)

On March 14, 1997, Clay again appealed her partial disability determination under the Plan enclosing the November 26, 1996, Social Security award. (R35 - Ex. 38; R36 - p. 130) On April 11, 1997, the Trustees denied her untimely appeal, explaining that no new medical information regarding her physical restrictions was included and the partial disability determination under the Plan was proper. (R35 - Ex. 39; R36 - pp. 132-33) On April 16, 1997, Clay sent the Trustees a copy of the Social Security Administrative Law Judge's decision. (R35 - Ex. 40; R36 - pp. 133-35) On April 25, 1997, the Trustees again denied Clay's untimely appeal, noting that the summary of medical information included was insufficient, as well as untimely. The Trustees also explained that the basis for a Social Security Administration disability determination differed from the Plan's definition of total disability. (R35 - Ex. 41; R36 - pp. 135-36)

On May 27, 1997, Clay submitted more documents to the Trustees. These primarily consisted of medical records she had previously submitted to the Trustees, again dating back to the 1980s. (R35 - Ex. 41; R36 - pp. 136-46) On July 9, 1997, the Trustees again denied Clay's untimely appeal. (R36 - Ex. 33) Although she had submitted some additional medical information with the May 27, 1997, letter, the Trustees found that it did not support a finding of total disability under the Plan terms.

These documents included notes of Dr. Baker from September 20, 1986, through October 18, 1995. These documents established that, throughout this period, Dr. Baker's diagnosis remained unchanged. (R35 – Ex. 42 at attachments 3, 4) Another medical report was a psychological evaluation, dated September 15, 1994, which noted that Clay "tends to exaggerate her symptoms." This

report also indicated that Clay was capable of "gainful employment." (R36 – Ex. 42 at attachment 23) The final two documents submitted with Clay's May 27, 1997, letter were dated September 12, 1995, and December 21, 1995. These consisted of an eye examination and the results of a laboratory report. Neither showed significant objective problems. (R36 – Ex. 42 at attachments 24, 25) There were no medical records submitted which were dated later than December 21, 1995. In concluding their response to Clay's May 27, 1997, letter, the Trustees explained that the Plan definition of total disability is clear and does not provide that a total disability determination by Social Security results in an automatic finding of total disability under the Plan. (R35 - Ex. 43; R36 - pp. 146-47)

The Trustees' decision in 1997 not to defer to the November 1996 Social Security Administration disability determination was consistent with the terms of the Disability Benefit Plan Policy and Operation Manual Procedure No. 4.15A, effective April 23, 1996, which, contrary to Clay's assertion, provides that, "[i]f the Plan is notified of a Social Security Award after termination of benefits at 52 weeks and after the 60 day appeal period, the Plan will generally not be required to reinstate Total Disability benefits." (R35 - Ex. 37)(emphasis supplied) Both the district court and the Eleventh Circuit specifically addressed the significance of the award of disability benefits by the Social Security Administration and found that the decision of the Trustees was reasonable and consistent with the language of the Plan.

REASONS FOR DENYING THE WRIT

Clay's arguments not only fail to meet the standards concerning issues which might be reviewed on certiorari, as

reflected in Supreme Court Rule 10, but also they present the type of questions which this Court has specifically stated are not appropriate for certiorari. First, although Clay offers the bald assertion that the Eleventh Circuit's decision in this case conflicts with the decisions of other circuits, her Petition fails to identify those circuits, the decisions, or the significant point of law as to which she claims there is a conflict. One is at a loss to determine whether she is arguing that a conflict among the circuits exists with respect to her argument concerning ambiguous plan language, her argument regarding ERISA-required notice, or both. In any event, examination of the opinions cited by Clay, other pertinent precedent, and comparison of that authority to the Eleventh Circuit decision in this case demonstrates harmony, not conflict, among the circuits with respect to the substantive issues herein.

Clay also quarrels with the lower court's application of properly stated rules of law to the undisputed facts of record. Such disputes are not generally grist for Supreme Court review. Supreme Court Rule 10; *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178-79 (1938)("Whether respondents acquiesced in the infringement and are estopped depends upon the facts. Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it.") Clay argues, for example, that the Plan terms are ambiguous and, therefore, arbitrary, capricious, and a *per se* violation of ERISA. Clay offers no authority to support this proposition. In fact, the Plan terms are clear: one who is capable of working full-time is not totally disabled.

Clay's true dispute with the Trustees' decision, and the lower court's opinion upholding it, is the Trustees'

refusal to permit Clay's doctor's conclusory and unsupported statement that Clay was totally disabled to contradict his previous opinions that she could return to work full-time. Clay also challenges the Trustees reliance on the fact that Clay failed to participate honestly in an FCA the Trustees had ordered to enable them to assess the extent of her limitations. In other words, she challenges the weight and sufficiency of the evidence relied upon by the Trustees.

Similarly, with respect to the ERISA notice requirements, Clay simply ignores the numerous, detailed letters to her from the Trustees describing the reasons for their decision (*inter alia*, her doctor's opinion that she could return to work full-time and her self-limited FCA performance), the Trustees' specific identification of the Plan terms upon which they base their determination, the Trustees' numerous requests for additional information (supporting medical evidence to establish a total disability and good faith performance of the FCA), and the Trustees' detailed descriptions of her appeal rights. All of these notices, individually and collectively, are in strict compliance with ERISA requirements. *Donato v. Metropolitan Life Ins. Co.*, 19 F.3d 375 (7th Cir. 1994).

Finally, Clay fails to identify any prejudice to her claim arising out of whatever deficiencies she perceives existed with the Plan's notices. Clay's quarrel is with the lower courts' application of well-established legal principles to the facts. In essence, Clay presented her view of the facts and applicable law in her arguments to the district court and the Eleventh Circuit. Both courts rejected those arguments. Clay now seeks, contrary to the unequivocal language of Rule 10 of this Court, to have this Court review the facts and her arguments as to the merits of her case.

I. THE ELEVENTH CIRCUIT'S DECISION THAT THE TRUSTEES' PLAN INTERPRETATION IS NOT ARBITRARY AND CAPRICIOUS IS CONSISTENT WITH OTHER CIRCUIT COURT PRECEDENT AND CORRECT ON THE MERITS.

A. CLAY FAILS TO IDENTIFY ANY CONFLICT AMONG THE CIRCUITS WITH RESPECT TO THE STANDARD OF REVIEW OF THE TRUSTEES' PLAN INTERPRETATION AND NONE EXISTS.

The Plan grants the Trustees "discretionary authority to interpret the terms of this Plan and to determine eligibility for an entitlement to plan benefits in accordance with the terms of the Plan." (R35 - Ex. 1 - pp. 15, 18; Ex. 2 - pp. 14, 16; Ex. 3 - pp. 14, 16) It is undisputed in Clay's Petition that the Trustees' Plan interpretations and benefit entitlement decisions are reviewed under the arbitrary and capricious standard. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989). In its decision below, as well as in other opinions, the Eleventh Circuit has consistently applied this deferential standard to determine whether the Trustees' Plan interpretation was reasonable. *See* Eleventh Circuit decision below at Clay Pet. at App. 5, quoting from *Brown v. Blue Cross & Blue Shield, Inc.*, 898 F.2d 1556, 1564 (11th Cir. 1990).

In support of its reasoning that the arbitrary and capricious standard controls and that trustees' decisions must be obviously unreasonable, the *Brown* decision relied upon

the Seventh Circuit's decision in *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1053 (7th Cir. 1987) and the Fourth Circuit's decision in *De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1191-92 (4th Cir. 1989). *Also see, Brehmer v. Inland Steel Indus. Pension Plan*, 114 F.3d 656, 660 (7th Cir. 1997) (Evaluating plan decisions to determine whether they are "downright unreasonable." (Quoting *Fuller v. CBT Corp.*, 905 F.2d 1055, 1058 (7th Cir. 1990)); *Hancock v. Montgomery Ward Long Term Disability Trust*, 787 F.2d 1302, 1308 (9th Cir. 1986) ("We are accordingly reluctant to substitute our judgment for that of the Trust and 'will do so only if the actions of the trustees are not grounded on any reasonable basis. . . ,'" (quoting *Ponce v. Construction Laborers Pension Trust*, 628 F.2d 537, 542 (9th Cir. 1980)); *Skretvedt v. E.I. DuPont De Nemours & Co.*, 268 F.3d 167, 173-74 (3rd Cir. 2001); *University Hosps. v. Emerson Elec. Co.*, 202 F.3d 839, 846 (6th Cir. 2000); *Jett v. Blue Cross & Blue Shield, Inc.*, 890 F.2d 1137, 1139 (11th Cir. 1989); and *Bayles v. Central States, Southeast & Southwest Areas Pension Fund*, 602 F.2d 97, 100 (5th Cir. 1979). Thus, the standard applied by the Eleventh Circuit in this case is in complete accord with the standard of review applied by other circuits and Clay has failed to provide any authority to the contrary.

Clay's claim that the Eighth Circuit's decision in *Brumm v. Bert Bell NFL Ret. Plan*, 995 F.2d 1433 (8th Cir. 1993), holds that a court's failure to articulate the basis for its conclusion that trustees' actions were reasonable is reversible error misstates the court's holding. (Clay Pet. at 16) Rather, the court in *Brumm* identified what it presumed to be the rationale of the trustees in their denial of benefits and held that it was an unreasonable interpretation of the plan. *Brumm*, 995 F.2d at 1436, 1440. In any event, as discussed

below, the lower court in this case did explain why the Trustees' interpretation was reasonable.

B. THE TRUSTEES' INTERPRETATION OF THE PLAN, WHICH RESULTS IN THE DENIAL OF TOTAL DISABILITY BENEFITS TO ONE WHO IS CAPABLE OF WORKING FULL-TIME AND WHICH REQUIRES MORE THAN A DOCTOR'S SUBJECTIVE CONCLUSORY OPINION TO SUPPORT A TOTAL DISABILITY FINDING, IS REASONABLE.

Clay fails to offer any authority to support her argument that an alleged ambiguity in a plan is arbitrary and capricious *per se* and unlawful under ERISA. (*See* Clay Pet. at 16) Such argument should be summarily rejected as the Eleventh Circuit did in its decision below. (Clay Pet. at App. 5) An application of the correct legal analysis demonstrates that the court below properly rejected Clay's argument. First, she fails to identify any ambiguity in the Plan. In addition, Clay does not articulate an interpretation of the Plan language and point to evidence in the record which would entitle her to total disability benefits pursuant to her interpretation. *See Buckley v. Metropolitan Life*, 115 F.3d 936, 940 (11th Cir. 1997)(". . . the court must first resolve whether the applicant has proposed a sound reading of the plan to rival that of the administrator. . . . If so, the court must then decide whether the administrator was arbitrary and capricious in adopting a different version."); *Recupero v. New Eng. Tel. & Tel. Co.*, 118 F.3d 820, 840 (1st Cir.

1997)(A party must proffer evidence sufficient to support a determination of ambiguity in some respect material to disposition on the merits of the controversy before the court.)

The Plan terms as applied to Clay are clear on their face: a total disability is defined as a "mental or physical condition resulting from an illness or injury which is generally considered totally disabling by the medical profession." In addition, a total disability "involves a condition of such severity as to require care in a hospital or restriction to the immediate confines of the home." (R35 - Ex. 1 - p. 5, Ex. 4 – p. 12) In contrast, a partial disability is "a mental or physical condition resulting from an illness or injury because of which the Participant cannot perform regular duties but can perform other useful duties. . . ." (R35 - Ex. 1 - p. 3, Ex. 4 – p. 16)

As applied to Clay, there is no ambiguity. The Trustees had before them her doctor's December 21 and December 22, 1993, medical certificates in which he concluded that she could return to work full-time with limited restrictions effective December 14, 1993, the independent medical examination conducted by Dr. Colohan, in which he concluded that she could work, and Clay's self-limited FCA. (R35 - Exs. 17, 20, 21, 22, 24, 27, 35) The Trustees refused to ignore this evidence. The Trustees also chose not to rely upon Clay's physician's subsequent certificate, which stated in conclusory fashion with no supporting medical information, objective or otherwise, that she was totally disabled effective December 14, 1993. (R35 – Ex. 35) An ability to work full-time is inherently inconsistent with total disability. Clay's "interpretation," which would permit one who can work full-time to claim total disability and require Trustee acquiescence in a doctor's

conclusory, unsupported opinion, even where the opinion is contradicted by his own prior opinions and by objective medial evidence, is irrational and inconsistent with ERISA's purpose of providing secure funding of employee benefit plans.

Clay's assertion that the Trustees failed to explain why she was not totally disabled under the terms of the Plan is simply inaccurate. (Clay Pet. at 15) The Trustees plainly and repeatedly explained that they considered her partially disabled, rather than totally disabled, under the terms of the Plan. For example, the Trustees notified Clay that she was considered partially disabled because "[h]er doctor, Dr. John B. Baker, has indicated that Ms. Clay may return to work. . .with. . .restrictions. . . ." (R35 – Ex. 17, Ex. 21) Clay also erroneously claims that the district court failed to explain what interpretation the Trustees had applied or how it was reasonable. (Clay Pet. at 16) For whatever reason, Clay has chosen to ignore the following explanation in the district court's opinion: "Clearly, the Trustees' decision on January 25, 1994 to grant only partial disability was not arbitrary and capricious, as plaintiff's own doctor cleared her to return to work, conclusively establishing that plaintiff's condition was not 'totally disabling.'" (Clay Pet. at App. 28) Thus, the district court recognized that the Trustees had adopted the common sense interpretation of the Plan language that one who is authorized to return to work full-time is not totally disabled.

Herein lies the heart of Clay's dispute with the Trustees' decision—not that they employed an unreasonable interpretation of the Plan, but that they refused to permit her doctor's conclusory, unsupported statement that she was totally disabled to trump his prior opinions that she could

work full-time, Dr. Colohan's opinion that she could work full-time, and her refusal to perform the FCA tasks. In sum, she challenges the weight and sufficiency of the evidence, not the Trustees' Plan interpretation, as recognized by the district court below:

> Although [Dr. Baker] made the bald assertions that plaintiff was totally disabled and unable to return to work, the physician did not, however, include any explanation or medical documentation to support his conclusion.
>
> The Trustees determined that plaintiff had not submitted sufficient medical information to support her claim for total disability. Indeed, plaintiff's claim for total disability contradicted the other medical information included in her file, including a 1994 functional capacity assessment that plaintiff chose not to complete and two previous doctor's determinations that plaintiff could return to work. The Court cannot find the Trustees' determination was arbitrary and capricious, especially in light of plaintiff's consistent refusal to complete a functional capacity assessment to aid in the Trustees' determinations of her disability status and the clear medical information in her file that supported their conclusion that plaintiff could still perform useful duties.

(Clay Pet. at App. 29-30)

As demonstrated by the district court, the Trustees' assessment of the weight and sufficiency of the evidence is

not arbitrary and capricious, and Clay presented no facts or legal precedent which even calls into doubt the finding of the district court.

II. THE ELEVENTH CIRCUIT'S DECISION THAT THE PLAN'S DETAILED DETERMINATION LETTERS SUBSTANTIALLY COMPLIED WITH THE ERISA NOTICE REQUIREMENTS IS CONSISTENT WITH OTHER CIRCUIT COURT PRECEDENT AND CORRECT ON THE MERITS.

In view of the opinions of both the district court and the Eleventh Circuit, the Trustees are puzzled by Clay's assertion that "federal courts have an obligation to review a Plan administration claims procedure to determine whether a participant received the statutory notice required under [ERISA]." (Clay Pet. at i) The district court discussed in detail the notices sent to Clay. Indeed, the district court devoted the bulk of its decision to a review of the facts and controlling law regarding the notices sent to Clay. (Clay Pet. App. 12-25, 27-30) Similarly, the Eleventh Circuit specifically noted, "We have reviewed and find without merit Clay's. . .argument that. . .(i) the Trustees violated ERISA procedure in handling her claims. . . ." (Clay Pet. App. 6) It is difficult to understand how it could be any clearer that the district court and the Eleventh Circuit did review the claims procedures in this case. The Trustees will, nonetheless, address this argument as set forth below.

A. THERE IS NO CONFLICT AMONG THE CIRCUITS WITH RESPECT TO THE ERISA NOTICE REQUIREMENTS.

Clay fails to identify any conflict among the circuits with respect to the notice requirements found at 29 U.S.C. § 1133. The reason for that is obvious—there is no conflict. Courts require substantial, not strict, compliance with the notice requirements found at 29 U.S.C. § 1133 and the accompanying regulation, 29 C.F.R. § 2560.503-1(f). The circuits also uniformly require a showing of prejudice due to noncompliance. *Wolfe v. J.C. Penney Co.*, 710 F.2d 388, 392 (7th Cir. 1983); *Counts v. American Gen. Life & Accident Ins. Co.*, 111 F.3d 105, 108 (11th Cir. 1997); *Perrino v. Southern Bell Tel. & Tel. Co.*, 209 F.3d 1309, 1317-18 (11th Cir. 2000); *Brown v. Retirement Comm. of Briggs & Stratton Ret. Plan*, 797 F.2d 521, 536 (7th Cir. 1986); *Terry v. Bayer Corp.*, 145 F.3d 28, 39 (1st Cir. 1998) ("[Plaintiff] has not presented any evidence that implies that a different outcome would have resulted had the notice been in formal compliance with the regulations.").

For example, in *Hancock v. Montgomery Ward Long Term Disability Trust*, 787 F.2d 1302, 1308 (9th Cir. 1986), the court rejected a claim that the trustees had not explained how they interpreted certain plan provisions. The Ninth Circuit explained:

> Substantive remedies are available for procedural defects under ERISA only when the defects 'caused a substantive violation or themselves worked a substantive harm. . . .'

> [Plaintiff] points to no prejudice to her from the alleged inadequacy of the letters, and we see none. Because there was substantial evidence to support the Trust's decision, a remand merely to require the Trust to send a more detailed letter 'would be a useless formality,' . . . accomplishing nothing. (Quoting from *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091, 1096 (9th Cir. 1985)).

Similarly, in *Kent v. United of Omaha Life Ins. Co.*, 96 F.3d 803, 807 (6th Cir. 1996), the Sixth Circuit explained that, "[w]hen claim communications as a whole are sufficient to fulfill the purposes of Section 1133, the claim decision will be upheld, even if a particular communication does not meet those requirements." The *Kent* court also held that remand would be a useless formality, since "much, if not all, the objective medical evidence supports the conclusion that plaintiff was not disabled." *Id.*

In yet another case, the Seventh Circuit, in *Donato v. Metropolitan Life Ins. Co.*, 19 F.3d 375, 382 (7th Cir. 1994), found that the substantial compliance test was met when "the beneficiary [was] supplied with a statement of reasons that, under the circumstances of the case, permitted a sufficiently clear understanding of the administrator's position to permit effective review." (Quoting from *Halpin v. W.W. Grainger, Inc.*, 962 F.2d 685, 689 (7th Cir. 1992)); *see also, Gallo v. Amoco Corp.*, 102 F.3d 918, 922-23 (7th Cir. 1996)(The court explained that the *Donato* statement of reasons for the decision does not require the administrator to provide "the reasoning behind the reasons [or] the interpretive process that generated the reason for the denial. . . . All he has to do is give the applicant the reason for the denial of benefits; he

does not have to explain to him why it is a good reason."); *Dade v. Sherwin-Williams Co.*, 128 F.3d 1135, 1142 (7th Cir. 1997).

Clay's citation of authority misses the mark. For example, the Ninth Circuit's decision in *Bendixen v. Standard Ins. Co.*, 185 F.3d 939 (9th Cir. 1999), holds that it is an abuse of discretion for a plan administrator to render a decision to a participant without "any explanation," rather than "without sufficient explanation", as stated by Clay. (Clay Pet. at 22)(emphasis supplied) Likewise, the Seventh Circuit's decision in *Young v. Secretary of Health & Human Servs.*, 957 F.2d 386 (7th Cir. 1992) addressed the Secretary of Health and Human Service's denial of Social Security Disability Insurance Benefits and has nothing to do with a denial of disability benefits governed by ERISA. Finally, the decisions in *University Hosps. v. Emerson Elec. Co.*, 202 F.3d 839 (6th Cir. 2000) and *Skretvedt v. E.I. DuPont De Nemours & Co.*, 268 F.3d 167 (3rd Cir. 2001) are inapplicable, as they hold that a court will not accept *post hoc* explanations for trustees' decisions which were never raised in the determination letter.

B. THE TRUSTEES' DECISIONS SUBSTANTIALLY COMPLY WITH THE ERISA NOTICE REQUIREMENTS.

The Trustees' decisions provide the reasons for the decision to deny Clay total disability benefits, refer to specific plan provisions, advise Clay of additional material necessary to pursue her claim, and advise her of the appeals process. (R35 - Exs. 17, 21, 22, 27, 35, 41, and 43) Specifically, in detailed correspondence dated January 25,

1994, the Trustees explained that they considered her "partially disabled as that term is defined in Article II, Section 11 of the Plan" because "[h]er doctor, Dr. John B. Baker, has indicated that Ms. Clay may return to work with the restrictions of no full range of reach (including overhead), no ladder climbing, no lifting over 30 lbs., no overhead lifting over 20 lbs. and no carrying over 20 lbs." (R35 – Ex. 17 – p. 2) The Trustees explained to Clay that she could appeal this decision, in writing, within sixty days of her receipt of the letter, that she could "supply any additional information which she believes supports her position," and, if she continues to be disabled upon expiration of the fifty-two weeks' of partial disability, "ask the Trustees to again review her status." (R35 – Ex. 17 – p. 2)

In response to Clay's appeal of the January 25, 1994, determination that she was partially disabled, the Trustees explained that the medical reports from 1986 and the recent MRI conducted in 1994 did nothing to change her doctor's opinion contained in the certificates he signed on December 21 and December 22, 1993, stating that she could return to full-time work with restrictions. (R35 – Ex. 21 – p. 2) The Trustees also explained that they had requested Clay to participate in a FCA to assist with their determination as to her continuing ability to work. Since she had refused, however, the Trustees explained that they "must rely on the information provided by Dr. Baker in December 1993." (R35 – Ex. 21 – p. 2)

After Clay finally attended the FCA, the Trustees reinstated her partial disability benefits by letter dated July 5, 1994, in which they noted the FCA did not show that she was totally disabled. (R35 – Ex. 27 – pp. 1, 7) In that correspondence, the Trustees also explained to Clay that she

should report to them any change in her condition "immediately" and that they would "review supporting medical information forwarded for consideration in determining whether your condition has improved or deteriorated." The Trustees explained, "A worsening of your condition of disability could make you eligible for total disability benefits. . . ," and included the definition of total disability from the Plan. (R35 – Ex. 27 – pp. 1-2)

Clay has never provided any "supporting medical information" demonstrating that she has "a condition of such severity as to require care in a hospital or restriction to the immediate confines of the home." (R35 – Ex. 27 – p. 2, quoting the Plan, Article II, Section 16; R35 – Ex. 1 – p. 5) Rather, Clay's counsel simply submitted her doctor's statement, dated December 2, 1994, stating that she had been totally disabled since December 14, 1993. (R35 – Ex. 34 – p. 3) Although this statement directly contradicts her doctor's prior two certificates, dated December 21 and December 22, 1993, in which he stated that she could return to work full-time with some restrictions, there is no explanation for this change of opinion or any supporting evidence, objective or otherwise. (R35 – Ex. 17) Accordingly, the Trustees, by letter dated January 10, 1995, rejected Clay's request for total disability, explaining that she had not provided any additional supporting medical information. The Trustees' January 10, 1995, letter again noted the Plan definition of partial disability, which includes the ability to "perform other useful duties." (R35 – Ex. 35 – p. 1) The Trustees then explained:

> Although Ms. Clay cannot perform her regular duties, she elected to not complete the FCA,

> which would have established any limitations of her disability. The Trustees requested that Ms. Clay supply information from her Physician identifying any physical limitations supporting a finding of total disability. Ms. Clay has declined to provide any such information. On the basis of these facts, the Trustees have determined that Ms. Clay is partially disabled.

(R35 – Ex. 35 – p. 1)

Thus, the Trustees clearly explained to Clay that it was her failure to complete the FCA or supply supporting medical information from her physician or anyone else identifying physical limitations which supported a finding of total disability which led to their partial disability conclusion. Clay's claim that this is the first time the Trustees had asked Clay to provide supporting medical information (Clay Pet. at pp. 19-20) is simply inaccurate, for the Trustees had expressly requested "supporting medical information" to determine whether her condition had deteriorated to the extent that she would be eligible for total disability benefits in their July 5, 1994, correspondence to Clay. (R35 – Ex. 27 – p. 1)

To date Clay has yet to provide any medical information to support her claim for total disability or offered to undertake the FCA in good faith, and the Eleventh Circuit's refusal to remand this proceeding to the Trustees remains sound. This principle is also well-recognized among the circuits. For example, in *Terry v. Bayer Corp.*, 145 F.3d 28, 39 (1st Cir. 1998), the court refused to remand the proceedings to the trustees based on alleged notice deficiencies where the claim was denied due to a lack of

objective medical evidence in support of the claim and the "[claimant's] failure to participate more fully in the work hardening program. . . ." *See also, Donato v. Metropolitan Life Ins. Co.*, 19 F.3d 375 (7th Cir. 1994), where the court held substantial compliance with ERISA notice requirements existed where the determination letters together provided the specific reasons for the denial of benefits, referred to pertinent plan provisions, explained what information had been considered, explained that, if additional medical information was provided, the plan administrator would review it, and explained the appeals process.

Finally, Clay's assertion that the Trustees wrongfully failed to defer to the Social Security Administration's total disability finding (Clay Pet. at 7) ignores the express provisions of the Plan, which state that if a total disability determination issues after expiration of the appeals period, the Trustees need not reverse their determination of partial disability. (R35 - Ex. 37 – p. 3) *See Paramore v. Delta Air Lines*, 129 F.3d 1446, 1452 at n. 5 (11th Cir. 1997).

CONCLUSION

Based on the foregoing arguments and cited authorities as to each issue raised by Clay, The Procter & Gamble Disability Benefit Plan and the other Respondents respectfully submit that the Petition for Writ of Certiorari should be denied in its entirety.

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